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IN THE

Supreme Court of the United States

No. 75-78
October Term, 1975

FRANK J. SOUZA, MANUEL J. SOUZA, *et al.*,
Petitioners,

vs.

LOUIS ROMERO,
Respondent.

Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The respondent, Louis Romero, respectfully prays that a Writ of Certiorari not issue to review the judgment and opinion of the United States Court of Appeals entered on February 19, 1975.

I.

ARGUMENT IN OPPOSITION TO WRIT.

A. The Court Below Did Not Err in Its Instructions to the Jury on the Issue of Unseaworthiness. The Court Fully Treated the Scope of the Area of Unseaworthiness and Properly Distinguished It From Concepts of Fault and Negligence.

The Court of Appeals for the Ninth Circuit, in deciding this issue, did not draw any distinction in its ruling regarding unseaworthiness. Rather, it fully considered the import and effect of the doctrine as related to the facts of the case and the subject jury instruction.

In so doing, the Court recognized the petitioner's duty to furnish a seaworthy ship, which was absolute and non-delegable. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946).

B. This Court Has Held in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, an Unseaworthy Condition is Liability Without Fault, Not Limited by Conceptions of Negligence nor Contractual in Character.

The test of an unseaworthy ship is one of reasonableness. Was the ship reasonably fit? *Mitchell v. Trawler Racer, Inc.*, 326 U.S. 539. However, the giving of an instruction which predicated liability upon a finding of fault has been held to be reversible error. *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 460-61 (4th Cir. 1963). Accord: *Yanow v. Weyerhauser Steamship Company*, 250 F.2d 74, 76 (9th Cir. 1957), cert. denied, 356 U.S. 937.

In *Ballwanz* the court stated:

> "However true it may be as an abstract proposition of law that unseaworthiness in a broad general sense cannot exist without fault on somebody's part in that it constitutes a breach of one's duty, it is not a fault in the ordinary everyday use of the term. Certainly no layman would accept as a 'fault' many of the conditions which the Court has held to constitute unseaworthiness . . .
>
> . . . Thus the Court's emphasis upon the necessity of finding fault . . . was an unjustifiable dilution of the doctrine of unseaworthiness as it has been developed by the Supreme Court." 319 F.2d at 460-61.

It is well settled that the ship owner's liability for unseaworthiness "is essentially a species of liability without fault" and "is neither limited by conceptions of negligence nor contractual in character." *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94 (1946).

Instructions must be considered as a whole and construed in the light of what an ordinary person would understand them to mean. *Dreckman v. Flores,* 331 F.2d 221, 222 (5th Cir. 1964); *Southern Pacific Co. v. Souza,* 179 F.2d 691, 694 (9th Cir. 1950).

The Court below found that the instructions in this case "accurately described the nature of a ship owner's duty to provide a seaworthy ship." (See Memorandum Opinion, Appendix A of Petitioner's Brief, p. 6).

In fact, this same instruction on unseaworthiness has been held not to create an imbalance between a ship owner's absolute duty to provide a seaworthy ship and his right to be an insurer of safety on board the ship. *Provenza v. American Export Lines, Inc.* 324 F.2d 660, 662-63 (4th Cir. 1963), cert. denied. 376 U.S. 952 (1964).

C. There Is No Real Conflict in the Decisions of Circuits.

Petitioner cites as a conflict in decisions, cases examining the nature of conduct which would create liability under wrongful death statutes. See: *Skovgaard v. the M/V Tungus,* 252 F.2d 14 (CA-3) aff. 358 U.S. 588; *Grigsby v. Coastal Marine Service of Texas, Inc.,* 412 F.2d 1011 (CA-5); *Compania etc. v. Torres,* 358 F.2d 209 (CA-5).

Consideration of fault as an element of unseaworthiness was not the issue. Rather, the courts sought to see if unseaworthiness was an element of "fault" as used in the subject wrongful death statutes.

II.
CONCLUSION.

Respondent submits that the question of law presented by the petition has been well settled by this Court, in its earlier treatment of the absolute liability imposed when the obligation of unseaworthiness is breached.

Petitioner would have us believe that the obligation is somewhat less, by dilution with concepts of negligence. However, case law is firm in its position that liability without fault is the standard, without limitation by conceptions of negligence.

The respondent prays that a Writ of Certiorari not be issued, that the petition be denied, and that the judgment below be affirmed.

Respectfully submitted,

JOHN A. MARIN,
Attorney for Respondent.